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No. 88-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OFELIA RODRIGUEZ DE QUIJAS, et al.,

Petitioners,

v.

SHEARSON/AMERICAN EXPRESS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Shearson/American Express, Inc. v. McMahon*, 482 U.S. ____, 107 S. Ct. 2332 (1987), mandates arbitration of claims asserted under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (1982), pursuant to a valid arbitration agreement?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	v
Statutory and Regulatory Provisions Involved	viii
Opinions Below	1
Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Fully Developed Conflict Among the Fifth, Tenth, Second and Third Circuits as to Whether *Shearson v. McMahon* Mandates Enforcement of Agreements to Arbitrate Claims Under § 12(2) of The Securities Act of 1933 Can Only Be Resolved By This Court Which Should Grant Certiorari in This Case	7
A. The Fifth and Tenth Circuits Have Held That *Shearson v. McMahon* Presently Renders Agreements to Arbitrate § 12(2) Claims Enforceable	11
B. The Second and Third Circuits Have Held That *Wilko v. Swan* Continues to Prohibit Pre-Dispute Agreements to Arbitrate § 12(2) Claims Notwithstanding *Shearson v. McMahon* Until This Court States Otherwise	14

Page

II. The Refusal of Courts to Enforce Agreements To Arbitrate § 12(2) Claims Continues to Infringe Upon Congressional Policies Underlying the Arbitration Act and Recent Precedent of This Court 16

III. The Conflict and Confusion Among the Lower Courts Requires Early Resolution to Avoid Increased Congestion in the Lower Courts 18

Conclusion 20

Appendices — Page

A. Statutory and Regulatory Provisions Involved — A-1

B. Opinion of the United States Court of Appeals for the Fifth Circuit, Dated May 31, 1988 ..... A-5

C. Opinion of the United States Court of Appeals for the Fifth Circuit, Dated June 22, 1988 ..... A-13

D. Opinion of the United States District Court for the Southern District of Texas, Dated November 18, 1986 ..... A-15

E. Opinion of the United States District Court for the Southern District of Texas, Dated July 14, 1987 ..... A-23

F. Judgment of the United States Court of Appeals for the Fifth Circuit, Entered on May 31, 1988 ..... A-25

G. District Court and State Court Cases Addressing the Enforceability of Agreements to Arbitrate 1933 Act Claims Post-*McMahon* . A-27

TABLE OF AUTHORITIES

Cases	Page
Abadian v. Drexel Burnham Lambert, Inc., No. 88-0186 (E.D. Pa. Aug. 5, 1988) (LEXIS, Fedsec library, Courts file)	9, 13
Allegaert v. Perot, 548 F.2d 432 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977)	12
Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976)	12
Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 693 F.2d 1023 (11th Cir. 1982)	12
Chang v. Lin, 824 F.2d 219 (2d Cir. 1987)	*passim*
Dain Bosworth Inc. v. Johnson, No. C9-87-1784, *petition for cert. filed*, 57 U.S.L.W. 3161 (U.S. Aug. 12, 1988) (No. 88-284)	10
Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985)	17, 19
Delancie v. Birr, Wilson & Co., 648 F.2d 1255 (9th Cir. 1981)	12
Jeppsen v. Piper, Jaffray & Hopwood, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,996 (D. Utah Aug. 16, 1988)	9, 14
Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979)	12
McCowan v. Dean Witter Reynolds, Inc., 682 F. Supp. 741 (S.D.N.Y. 1987)	15

	Page
Merrill Lynch, Pierce, Fenner & Smith Inc. v. Moore, 590 F.2d 823 (10th Cir. 1978)	12
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)	17
Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983)	17
Noble v. Drexel Burnham Lambert, Inc., 823 F.2d 849 (5th Cir. 1987)	7
Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 841 F.2d 508 (3d Cir. 1988)	*passim*
Peterson v. Shearson/American Express, Inc., 849 F.2d 464 (10th Cir. 1988)	6, 8, 11, 14
Reed v. Bear, Stearns & Co., No. 88-2040-0 (D. Kan. Aug. 19, 1988) (LEXIS, Fedsec library, Courts file)	14
Rodriguez De Quijas v. Shearson/American Express, Inc., 845 F.2d 1296 (5th Cir.), *reh'g en banc denied*, 850 F.2d 1582 (1988) (per curiam)	*passim*
Shearson/American Express, Inc. v. McMahon, 482 U.S. ____, 107 S. Ct. 2332 (1987)	*passim*
Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977)	12
Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 733 F.2d 59 (8th Cir. 1984)	12
Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc., 558 F.2d 831 (7th Cir. 1977)	12
Wilko v. Swan, 346 U.S. 427 (1953)	*passim*

Page

Statutes and Regulations

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982) 3

Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1982) 3

Sec. 12(2), 15 U.S.C. § 77*l*(2) 3

Sec. 14, 15 U.S.C. § 77n 3, 11

Sec. 22(a), 15 U.S.C. § 77v(a) 3

Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982) 3

Sec. 10(b), 15 U.S.C. § 78j(b) 6

Sec. 19, 15 U.S.C. § 78s 13

Sec. 19(b)(2), 15 U.S.C. 78s(b)2 13

Sec. 19(c), 15 U.S.C. 78s(c) 13

Sec. 29(a), 15 U.S.C. § 78cc(a) 12

United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982) 3

Sec. 2, 9 U.S.C. § 2 16

Sec. 3, 9 U.S.C. § 3 16

Sec. 4, 9 U.S.C. § 4 16

28 U.S.C. § 1254(1) (1982) 1

Other Materials

Annual Report of the Director of the Administrative Office of the United States Courts (1987) 18

H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924) .. 16

SEC Securities Exchange Act Release No. 16930 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979) 13

STATUTORY AND REGULATORY PROVISIONS INVOLVED*

United States Arbitration Act

Section 2, 9 U.S.C. § 2

Section 3, 9 U.S.C. § 3

Securities Act of 1933

Section 12(2), 15 U.S.C. § 77*l*(2)

Section 14, 15 U.S.C. § 77n

Section 22(a), 15 U.S.C. § 77v(a)

Securities Exchange Act of 1934

Section 10(b), 15 U.S.C. § 78j(b)

Section 19, 15 U.S.C. § 78s

Section 27, 15 U.S.C. § 78aa

Section 29(a), 15 U.S.C. § 78cc(a)

* The text of these provisions is reproduced in full at Appendix A hereto.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 845 F.2d 1296, and is reproduced at Appendix B hereto. The order of the court of appeals denying petitioners' motion for rehearing *en banc* is reported at 850 F.2d 1582 and is reproduced at Appendix C hereto. The opinions of the United States District Court for the Southern District of Texas are unreported but are reproduced at Appendix D and Appendix E hereto.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1988 and is reproduced at Appendix F hereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1982).

STATEMENT OF THE CASE

Petitioners opened securities accounts with a financial consultant formerly employed by respondent Shearson Lehman Hutton Inc., named herein as Shearson/American Express, Inc. ("Shearson") in a Shearson branch office located in Brownsville, Texas at various times in 1982 and 1983.[1] At or around the time petitioners opened their accounts, they entered into Customer's Agreements with Shearson. Each of these agreements provides that any controversy relating to the various accounts petitioners maintained with Shearson is to be resolved through arbitration at one of three designated self-regulatory organization ("SRO") arbitration forums:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I [the customer] may elect.

Petitioners filed complaints against Shearson and their financial consultant in the United States District Court for the Southern District of Texas on August 23, 1985 and November 27, 1985.[2] Petitioners alleged that there had been excessive and unauthorized trading in their accounts, that false statements were made and material facts omitted from the advice given to them, and that certain securities purchased in their accounts were not appropriate in light of their investment objectives. Petitioners alleged that this conduct constituted violations of: (a) §§ 12(2) and 17(a) of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* (1982) (the "1933 Act"); (b) § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (1982) (the "1934 Act") and Securities and Exchange Commission ("SEC") Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240-10b-5; (c) §§ 15(c)(1) and 15(c)(2) of the 1934 Act and SEC Rules 15cl-2, 15cl-4 and 15cl-6 promulgated thereunder; (d) §§ 206 and 215 of the Investment Advisors Act of 1940; (e) the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (1982) ("RICO"); (f) various state and common laws; and (g) various rules and regulations of the New York Stock Exchange, Inc. ("N.Y.S.E.") and the National Association of Securities Dealers, Inc. ("N.A.S.D.").

Shearson filed a motion in the district court for, among other things, an order to enforce the arbitration agreements entered into by the parties pursuant to § 3 of the United States Arbitration Act, 9 U.S.C. § 1 *et seq.* (1982). In an opinion dated November 18, 1986, the district court granted Shearson's motion to dismiss petitioners' claims asserted under § 17(a) of the 1933 Act and its motion to stay proceedings pending arbitration of all petitioners' remaining claims except those asserted under § 12(2) of the 1933 Act, 15 U.S.C. § 77*l*(2), and those asserted under the 1934 Act. The district court based its refusal to order the parties to arbitrate petitioners' § 12(2) claims on *Wilko* v. *Swan*, 346 U.S. 427 (1953), in which the Court held that an agreement to arbitrate a § 12(2) claim violates § 14 of the 1933 Act, an anti-waiver provision, 15 U.S.C. § 77n, as an agreement waiving the jurisdictional provision of the 1933 Act. *See* Appendix D at A-18 (citing *Wilko*, 346 U.S. at 434-35). The jurisdictional provision of the 1933 Act, § 22(a), provides that a plaintiff may bring an action to enforce rights under the 1933 Act in either a federal or a state court. 15 U.S.C. § 77v(a). The district court's refusal to order arbitration of petitioners' claims asserted under the 1934 Act was based on prior circuit precedent extending the rationale underlying *Wilko* to the 1934 Act. *See* Appendix D at A-19.

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[1] Petitioners are those individuals listed in the Petition for a Writ of Certiorari ("Petition"). *See* Petition at 1 n.1. The parent company of Shearson is Shearson Lehman Hutton Holdings Inc. which is a non-wholly owned subsidiary of the American Express Company. E.F. Hutton & Company, Inc. is a wholly owned subsidiary of Shearson. Petitioners' financial consultant, Jon Grady Deaton, a defendant below, was not a party to the appeal before the Fifth Circuit and is not a party to this proceeding.

[2] The four complaints filed by petitioners in the district court were consolidated for purposes of appeal. The arbitration orders of the district court and court of appeals were identical for all four complaints.

Shearson filed a motion with the district court to reconsider its refusal to order the parties to arbitrate petitioners' claims under § 12(2) of the 1933 Act, based on the rationale underlying this Court's opinion in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. ____, 107 S. Ct. 2332 (1987), wherein the Court ruled that agreements to arbitrate claims under § 10(b) of the 1934 Act and RICO are enforceable. The district court subsequently ruled that petitioners' § 10(b) claims were arbitrable but ruled that their § 12(2) claims were nonarbitrable in an opinion dated July 14, 1987. *See* Appendix E.

Shearson filed an appeal with the United States Court of Appeals for the Fifth Circuit to review the district court's refusal to order the parties to arbitrate petitioners' claims asserted under § 12(2) of the 1933 Act. On May 31, 1988, the Fifth Circuit reversed the district court, ruling that the rationale underlying *McMahon* mandates enforcement of the parties' agreement to arbitrate petitioners' § 12(2) claims. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 845 F.2d 1296, 1299 (5th Cir.), *reh'g en banc denied*, 850 F.2d 1582 (1988) (per curiam). Petitioners filed a petition for a writ of certiorari to review the order of the Fifth Circuit dated August 31, 1988. Petitioners contend that such a writ should be granted and the Fifth Circuit reversed based on their arguments that:

(a) the Fifth Circuit improperly failed to follow this Court's holding in *Wilko* that § 12(2) claims are nonarbitrable;

(b) the Fifth Circuit's opinion is in conflict with the opinion of the Second Circuit Court of Appeals in *Chang v. Lin*, 824 F.2d 219 (2d Cir. 1987), as well as federal district court and state court opinions; and

(c) Congress has recently proposed a Bill which, if passed, would amend the 1934 Act regarding the enforceability of agreements to arbitrate federal securities law claims.

See Petition at 4-5.

To the extent that petitioners seek a writ of certiorari to resolve the conflict that exists between the Fifth Circuit and Second Circuit Courts of Appeals, as well as various federal district courts and state courts, Shearson agrees that the issuance of a writ of certiorari is needed to provide uniformity throughout the nation on the issue of whether agreements to arbitrate claims asserted under § 12(2) of the 1933 Act are presently enforceable in light of *McMahon*.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision enforcing an agreement to arbitrate claims asserted under § 12(2) of the 1933 Act was based on the rationale underlying this Court's opinion in *McMahon*, wherein the Court held that agreements to arbitrate claims arising under § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and RICO are enforceable. The Fifth Circuit chose to rely on *McMahon* as presently governing the issue rather than *Wilko* which held that agreements to arbitrate § 12(2) claims are unenforceable. *Rodriguez*, 845 F.2d at 1298-99. The Tenth Circuit reached the same conclusion in *Peterson v. Shearson/American Express, Inc.*, 849 F.2d 464, 466 (10th Cir. 1988).

The Second Circuit has stated that *Wilko* continues to govern the enforceability of agreements to arbitrate § 12(2) claims until this Court expressly states otherwise. *See Chang v. Lin*, 824 F.2d 219, 222 (2d Cir. 1987). The Third Circuit has chosen to follow the Second Circuit and also continues to rely on *Wilko* rather than *McMahon* on the issue. *See Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 841 F.2d 508, 512 (3d Cir. 1988).

The direct conflict among the circuits as to whether *McMahon* or *Wilko* presently governs the enforceability of agreements to arbitrate § 12(2) claims is fully developed. The circuit courts as well as numerous district courts and state courts hold either that the rationale underlying *McMahon* presently governs the issue or that *Wilko* controls until this Court specifically states otherwise. Courts that adhere to *Wilko*, notwithstanding *McMahon*, are fostering the type of judicial hostility against arbitration agreements that this Court and Congress has sought to eliminate. Moreover, the lower courts continue to be burdened with motions to compel arbitration and lawsuits which should be resolved by arbitration. Only this Court can resolve the conflict that exists among the circuits and Shearson respectfully submits that it should do so in the present case.

I. The Fully Developed Conflict Among the Fifth, Tenth, Second and Third Circuits as to Whether *Shearson v. McMahon* Mandates Enforcement of Agreements to Arbitrate Claims Under § 12(2) of the Securities Act of 1933 Can Only Be Resolved by This Court Which Should Grant Certiorari in This Case

The enforceability of agreements to arbitrate claims asserted under § 12(2) of the 1933 Act is an issue which seemed to have been resolved approximately thirty-five years ago in *Wilko v. Swan*, 346 U.S. 427 (1953), wherein the Court ruled that such agreements were unenforceable. The continued viability of *Wilko* has been called into question due to the rationale underlying this Court's opinion in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. ____, 107 S. Ct. 2332 (1987). The Court in *McMahon* ruled that agreements to arbitrate claims asserted under § 10(b) of the 1934 Act (as well as RICO) are enforceable. An application of the rationale underlying the Court's opinion in *McMahon* to § 12(2) of the 1933 Act indicates that claims asserted under this statute are also presently arbitrable.

The Fifth Circuit Court of Appeals in the present case has interpreted *McMahon* to mandate enforcement of valid agreements to arbitrate § 12(2) claims:

> *McMahon* undercuts every aspect of *Wilko v. Swan* . . . .; a formal overruling of *Wilko*, appears inevitable — or, perhaps, superfluous.

Rodriguez, 845 F.2d at 1298 (citing *Noble v. Drexel Burnham Lambert, Inc.*, 823 F.2d 849, 850 n.3 (5th Cir. 1987)).

The Tenth Circuit Court of Appeals has also recognized that an application of the rationale underlying *McMahon* to § 12(2) of the 1933 Act renders agreements to arbitrate these claims presently enforceable notwithstanding *Wilko*:

> In *Wilko*, the Court determined that an agreement to arbitrate was void under § 14 of the 1933 Securities Act .... In *McMahon*, the Supreme Court essentially overruled *Wilko*. *See Rodriguez De Quijas v. Shearson/American Express, Inc.*, 845 F.2d 1296 (5th Cir. 1988). In doing so, the Court recognized arbitration as an acceptable method of dispute resolution under the 1934 Exchange Act.

Peterson v. Shearson/American Express, Inc., 849 F.2d 464, 466 (10th Cir. 1988).

In contrast, the Second Circuit Court of Appeals in *Chang v. Lin*, 824 F.2d 219 (2d Cir. 1987) has stated that *Wilko* continues to govern the issue of the enforceability of agreements to arbitrate § 12(2) claims until this Court states otherwise:

> Although the Supreme Court in *McMahon* questioned the rationale underlying *Wilko*, the Court nevertheless did not overrule that decision, and it continues to govern us.

Chang, 824 F.2d at 222. The Third Circuit has reached the same conclusion as did the Second Circuit in *Chang*. In *Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 841 F.2d 508 (3d Cir. 1988), the Third Circuit stated:

> As long as *Wilko* stands in the Supreme Court, agreements to arbitrate claims under the Securities Act of 1933 will remain unenforceable....

Osterneck, 841 F.2d at 512.

The conflict among the Fifth, Tenth, Second and Third Circuit Courts of Appeals as to whether *McMahon* or *Wilko* presently governs the issue of the enforceability of agreements to arbitrate § 12(2) claims is mirrored by a similar conflict that exists among the federal district courts and the state courts

nationwide.[3] These courts have recognized the clear conflict that exists on the issue and have chosen to follow either the Fifth and Tenth Circuits' approach or the Second and Third Circuits' approach. For example, the United States District Court for the Eastern District of Pennsylvania recently ruled that agreements to arbitrate § 12(2) claims are unenforceable, relying on *Osterneck* and *Chang* rather than *Rodriguez*:

> The Court of Appeals for the Third Circuit explicitly held in *Osterneck* — that until *Wilko* is expressly overturned, "agreements to arbitrate claims under the Securities Act of 1933 will remain unenforceable." Therefore, I find that the Supreme Court has not expressly overruled its decision in *Wilko*. *See Chang* ... *But See Rodriguez* ....

Abadian v. Drexel Burnham Lambert, Inc., No. 88-0186 (E.D. Pa. Aug. 5, 1988) (LEXIS, Fedsec library, Courts file) (citations omitted). *See also Jeppsen v. Piper, Jaffray & Hopwood, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 93, 996 at p. 90,651 (D. Utah Aug. 16, 1988) ("The Tenth Circuit has taken the position that '[i]n *McMahon*, the Supreme Court essentially overruled *Wilko*.' ").

Although Shearson contends that the Fifth Circuit properly ruled that the rationale underlying the Court's opinion in *McMahon* mandates enforcement of agreements to arbitrate § 12(2) claims, it believes that it is essential for the Court to grant certiorari to review and affirm the Fifth Circuit's opinion and resolve the conflict that exists on this issue. Without the Court's definitive resolution of the issue, parties to valid arbitration agreements will be denied the right to have § 12(2) disputes

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[3] Shearson is aware of twenty-nine cases nationwide that have decided the enforceability of agreements to arbitrate claims asserted under § 12(2) and other sections of the 1933 Act since this Court decided *McMahon*. Sixteen decisions have held that such agreements are enforceable based on *McMahon*, while thirteen decisions have held that such agreements are unenforceable based on *Wilko*. A complete list of the district and state court decisions on this issue appears at Appendix G.

resolved in an arbitration forum capable of enforcing rights under the federal securities laws pursuant to the United States Arbitration Act. As a result, courts will continue to be burdened with unnecessary motions to compel arbitration and lawsuits asserting claims that should be resolved through arbitration. The Court should end this waste of judicial resources. This is especially so due to the fact that the SEC, the governmental agency responsible for administering the federal securities laws, has already advised the Court in the *amicus curiae* brief it filed in *McMahon* in support of Shearson, that it believes that agreements to arbitrate § 12(2) claims are presently enforceable:

> [A] present-day customer-broker agreement to arbitrate pursuant to SRO arbitration procedures would be enforceable, even with respect to claims arising under Section 12(2) of the 1933 Act, the section under which the claim in *Wilko* arose. . . .

See Brief of the SEC as *Amicus Curiae* in McMahon ("SEC *amicus* brief") at 20.[4]

Shearson respectfully suggests that the Court end the unnecessary waste of judicial resources that are being expended by courts which continue to force parties to litigate § 12(2) claims in a judicial forum notwithstanding the existence of valid contractual arbitration agreements covering these claims. The Court should grant certiorari to review and affirm the Fifth Circuit's opinion in this case and protect the Congressional policies underlying the Arbitration Act.[5]

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[4] The arbitration agreements governing the parties' disputes in the present case provide that the arbitration forum to hear their disputes will be one of three designated SRO forums just as the arbitration agreement governing the parties' disputes in *McMahon* provided.

[5] A petition for a writ of certiorari was filed with the Court in *Dain Bosworth Inc. v. Johnson*, No. C9-87-1784, *petition for cert. filed*, 57 U.S.L.W. 3161 (U.S. Aug. 12, 1988) (No. 88-284), seeking review of the same issue presented in this case. The petitioner in *Johnson* is seeking a writ of certiorari for the Court to review an order of the Minnesota Supreme Court which denied review of a decision of the Minnesota Court of Appeals affirming a refusal to order arbitration of a claim asserted under § 12(2) of the 1933 Act.

A. The Fifth and Tenth Circuits Have Held That *Shearson v. McMahon* Presently Renders Agreements to Arbitrate § 12(2) Claims Enforceable

The Fifth Circuit in the present case expressly chose to follow the rationale underlying this Court's opinion in *McMahon* to support its ruling that agreements to arbitrate claims asserted under § 12(2) of the 1933 Act are enforceable notwithstanding the contrary holding in *Wilko*. *Rodriguez*, 845 F.2d at 1298-99. The Tenth Circuit in *Peterson* also stated that *McMahon* presently governs the enforceability of agreements to arbitrate § 12(2) claims. *Peterson*, 849 F.2d at 466. The Court in *McMahon* was faced with, among other things, the issue of whether an agreement to arbitrate a claim arising under § 10(b) of the 1934 Act is enforceable. The Court had to reconcile the *Wilko* opinion and determine if *Wilko* applied to § 10(b) of the 1934 Act.

The *Wilko* Court had held that an agreement to arbitrate a claim under § 12(2) of the 1933 Act was unenforceable as an agreement waiving the jurisdictional provision of the 1933 Act which provides for concurrent jurisdiction in both the federal district courts and state courts to resolve disputes under the 1933 Act. *See Wilko*, 346 U.S. at 434-35. The Court based its decision on its interpretation of the anti-waiver provision of the 1933 Act which precludes enforcement of any agreement which waives "compliance with any provision" of the 1933 Act. § 14, 15 U.S.C. § 77n. Since the *Wilko* Court believed that an arbitration forum was not capable of enforcing rights under the 1933 Act, the Court concluded that an agreement waiving the right to have a judicial forum resolve a § 12(2) claim was prohibited as an agreement "waiving compliance" with the 1933 Act:

> As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review [of § 12(2) claims].

Wilko, 346 U.S. at 437 (citation and footnote omitted).

Due to the fact that the 1934 Act contains an anti-waiver provision, § 29(a), 15 U.S.C. § 78cc(a), which is in all substantive respects the same as the anti-waiver provision contained in the 1933 Act, the courts of appeals had assumed that *Wilko* applied equally to the 1934 Act rendering agreements to arbitrate claims under § 10(b) of the 1934 Act unenforceable.[6] The Court in *McMahon* rejected the application of *Wilko* to § 10(b) of the 1934 Act. The Court recognized that the *Wilko* Court's interpretation of an anti-waiver provision as prohibiting an agreement to arbitrate a § 12(2) claim was based solely on its view that arbitration was inadequate to protect rights under the statute:

> The conclusion in *Wilko* was expressly based on the Court's belief that a judicial forum was needed to protect the substantive rights created by the Securities Act: "As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review." *Wilko* must be understood, therefore, as holding that the plaintiff's waiver of the "right to select the judicial forum," . . . was unenforceable only because arbitration was judged inadequate to enforce the statutory rights created by § 12(2).

McMahon, 107 S. Ct. at 2338.

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[6] *See Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 733 F.2d 59, 61-62 (8th Cir. 1984); *Belke v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 693 F.2d 1023, 1025-26 (11th Cir. 1982); *Delancie v. Birr, Wilson & Co.*, 648 F.2d 1255, 1258-59 (9th Cir. 1981); *Mansbach v. Prescott, Ball & Turben*, 598 F.2d 1017, 1030 (6th Cir. 1979); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Moore*, 590 F.2d 823, 827-29 (10th Cir. 1978); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 558 F.2d 831, 833-35 (7th Cir. 1977); *Allegaert v. Perot*, 548 F.2d 432, 436-38 (2d Cir.), *cert. denied*, 432 U.S. 910 (1977); *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532, 536 (3d Cir.), *cert. denied*, 429 U.S. 1010 (1976); *Sibley v. Tandy Corp.*, 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977).

After analyzing the arbitration forums maintained by the various SROs, the Court ruled that these forums are adequate to protect and enforce rights under the federal securities laws even if they were not when *Wilko* was decided:

> [T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. This is especially so in light of intervening changes in the regulatory structure of the securities laws.

McMahon, 107 S. Ct. at 2341. The Court relied on the fact that, unlike during the time when *Wilko* was decided, the SEC presently has broad power to ensure the adequacy of SRO arbitration. This power was granted to the SEC by Congress in its 1975 amendments to § 19 of the 1934 Act, 15 U.S.C. § 78s. Examples of the SEC's broad oversight power are its power to "abrogate, add to, and delete from" any SRO rule if it is inconsistent with the federal securities laws and the fact that no proposed rule change may take effect unless first approved by the SEC. *See* § 19(b)(2), 15 U.S.C. § 78s(b)(2); § 19(c), 15 U.S.C. 78s(c). Moreover, the SEC has specifically approved of the arbitration procedures of the N.Y.S.E., the N.A.S.D. and the American Stock Exchange, Inc., the SRO arbitration forums that were listed in the arbitration agreement that governed the parties' disputes in *McMahon* and which govern the parties' disputes in the present case.[7] It was for these reasons that the Court in *McMahon* found that an arbitration forum is capable of enforcing rights under the 1934 Act rendering the *Wilko* interpretation of an anti-waiver provision inapplicable to § 10(b) of the 1934 Act. *McMahon*, 107 S. Ct. at 2341-42.

The Court's refusal to rely on the *Wilko* Court's interpretation of an anti-waiver provision as prohibiting an agreement to arbitrate claims under the federal securities laws, was not based on any distinction between the 1933 Act and the 1934 Act, and was due solely to the significant changes in securities arbitration that have been made since *Wilko* was decided:

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[7] *See* SEC Securities Exchange Act Release No. 16390 (Nov. 30, 1979), 18 S.E.C. Docket 1197 (1979); *see also* SEC *amicus* brief at 18.

> Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority.

McMahon, 107 S. Ct. at 2341.

The rationale underlying *McMahon* applies equally to both the 1933 Act and the 1934 Act rendering the *Wilko* interpretation of an anti-waiver provision presently incapable of prohibiting an agreement to arbitrate a § 12(2) claim at an SRO arbitral forum. The Fifth and Tenth Circuit Courts of Appeals' recognition of this fact led these courts to state that agreements to arbitrate § 12(2) claims are presently enforceable. Thus, courts within the Fifth and Tenth Circuits will no longer refuse to enforce parties' agreements to resolve their § 12(2) disputes at forums which this Court has ruled are perfectly capable of protecting rights under the federal securities laws.[6]

Unlike the Fifth and Tenth Circuit Courts of Appeals, the Second and Third Circuit Courts of Appeals have refused to acknowledge the fact that *Wilko* no longer renders agreements to arbitrate § 12(2) claims unenforceable in light of the rationale underlying *McMahon*.

B. The Second and Third Circuits Have Held That *Wilko* v. *Swan* Continues To Prohibit Pre-Dispute Agreements To Arbitrate § 12(2) Claims Notwithstanding *Shearson* v. *McMahon* Until This Court States Otherwise

The Second Circuit has made it clear in *Chang* that it will adhere to *Wilko* and refuse to enforce valid agreements to arbitrate § 12(2) claims until this Court specifically states that such agreements are presently enforceable. *Chang*, 824 F.2d at 222. Although the issue of the enforceability of agreements to arbitrate § 12(2) claims was not squarely before the Second

[6] *See, e.g., Reed* v. *Bear, Stearns & Co.*, No. 88-2040-0 (D. Kan. Aug. 19, 1988) (LEXIS, Fedsec library, Courts file) (§ 12(2) claims arbitrable based on the *Rodriguez* and *Peterson* interpretation of *McMahon*); *see also Jeppson*.

Circuit in *Chang*, the court's statement that "a plaintiff has the right to litigate a '33 Act claim in a federal court notwithstanding any arbitration agreement with the defendant," *Id.*, has caused and will continue to cause courts within the Second Circuit to refuse to enforce valid agreements to arbitrate § 12(2) claims. *See, e.g., McCowan v. Dean Witter Reynolds, Inc.*, 682 F. Supp. 741, 744 (S.D.N.Y. 1987) (*Wilko* still governs arbitrability of § 12(2) claims citing *Chang*). The same is true for courts within the Third Circuit due to *Osterneck*. *See, e.g., Abadian*.

The fact that the § 12(2) issue was not specifically decided by the Court in *McMahon*, since the issue was not before it, is the reason numerous federal district courts and state courts in addition to the Second and Third Circuits continue to fail to recognize that valid agreements to arbitrate claims under § 12(2) of the 1933 Act are presently enforceable in light of the Court's rationale underlying *McMahon*. *See* Appendix G. It is thus essential that the Court resolve the conflict that exists among the lower federal courts and specifically rule on the present enforceability of agreements to arbitrate § 12(2) claims. There are no further arguments to be developed by the lower federal courts. These courts either decide to accept the *McMahon* rationale to enforce agreements to arbitrate § 12(2) claims or decide to remain bound by *Wilko* until told otherwise by the Court. Until the Court resolves the issue definitively, its recent precedents which have developed significant substantive law under the Arbitration Act and the Congressional policies underlying the Act will continue to be thwarted.

II. The Refusal of Courts to Enforce Agreements to Arbitrate § 12(2) Claims Continues to Infringe Upon Congressional Policies Underlying the Arbitration Act and Recent Precedent of This Court

Congress enacted the Arbitration Act to reverse judicial hostility against arbitration agreements which had existed in the English common law and was adopted by the American Courts. H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924). Congress' intent underlying the enactment of the Act was to ensure that courts would defer to arbitration agreements as they would to any contractual agreement:

> Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

Id. The Arbitration Act provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act mandates that a court stay its proceedings and direct the parties to an arbitration agreement to resolve their disputes in an arbitration forum. 9 U.S.C. § 3-4.

The Court has decided several cases involving arbitration issues in recent years to protect Congress' desire to ensure the enforcement of valid arbitration agreements and has created significant substantive law in furtherance of the Arbitration Act. In ruling that agreements to arbitrate § 10(b) and RICO claims are enforceable in *McMahon*, the Court reiterated the strength of the Arbitration Act:

> The Arbitration Act thus establishes a "federal policy favoring arbitration," *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), 103 S. Ct. 927, 941, 74 L. Ed.2d 765 (1983), requiring that "we rigorously enforce agreements to arbitrate." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985).

McMahon, 107 S. Ct. at 2337.

The Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), rejected the argument that public policy concerns require that claims under the antitrust laws be resolved solely in a judicial and not an arbitral forum. The Court held that antitrust claims can be resolved by arbitration even though "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Mitsubishi*, 473 U.S. at 614. More importantly, the Court conclusively established that claims founded upon statutes can be arbitrated:

> The [Arbitration Act] provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.

Id. The Court in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985), after scrutinizing the legislative history of the Arbitration Act, held that its primary purpose was to ensure judicial enforcement of privately made agreements to arbitrate, rather than to promote the speedy and expeditious resolution of disputes. *Byrd*, 470 U.S. at 219.

All of these precedents taken together with *McMahon* should indicate to the lower federal courts that valid agreements to arbitrate § 12(2) claims should be enforced pursuant to the Arbitration Act. The continued refusal by many courts to enforce valid agreements to arbitrate § 12(2) claims conflicts with the rationale underlying *McMahon*, as well as Congressional intent underlying the Aribtration Act and continues to foster the type of judicial hostility against arbitration agreements that this Court and Congress has sought to eliminate:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals should inhibit enforcement of the Act . . . .

McMahon, 107 S. Ct. at 2337 (citing *Mitsubishi*, 473 U.S. at 627). The Court should grant certiorari to review and affirm the Fifth Circuit's opinion and thereby ensure that the substantive law it has created under the Arbitration Act in furtherance of Congressional intent is no longer thwarted by courts relying on outdated precedent.

III. The Conflict and Confusion Among the Lower Courts Requires Early Resolution to Avoid Increased Congestion in the Lower Courts

As long as the enforceability of agreements to arbitrate § 12(2) claims is not definitively resolved, the issue will continue to be the subject of motion and appellate practice consuming inordinate and unnecessary amounts of judicial resources. Each week brings new filings of securities-related cases in addition to those currently pending in the courts. Statistics compiled by the Administrative Office of the United States Courts reveal that during the twelve months ended June 30, 1987, a total of 2,844 "Securities, Commodities, and Exchanges" private civil actions were filed in the federal district courts. *See* Annual Report of the Director of the Administrative Office of the United States Courts, Table C2 (1987). This flood of private securities lawsuits, many raising claims subject to valid arbitration agreements will continue to force the district courts to decide the enforceability of such agreements and, perhaps, to decide claims that parties had agreed to resolve by arbitration. The burden on the district courts of leaving the issue of the enforceability of agreements to arbitrate § 12(2) claims unresolved is not limited to deciding numerous motions to compel arbitration. When the courts within the Second and Third Circuits are added to the substantial number of courts that may choose to follow their

opinions in *Chang* and *Osterneck* as well as all of the federal district and state courts that have already refused to enforce agreements to arbitrate § 12(2) claims, *see* Appendix G, it is clear that, unless this Court acts to resolve the issue quickly, a significant number of otherwise arbitrable disputes will be litigated in already overcrowded courts.

The Arbitration Act reflects a strong Congressional policy in favor of reducing congestion in courts. When parties agree that a claim should be resolved out of court and in a forum that this Court has already ruled to be fair, impartial and adequate to resolve statutory disputes, only explicit Congressional intent should prohibit that agreement and require the expenditure of the time and resources required by litigation in a judicial forum.

An express declaration by the Court that the rationale underlying its opinion in *McMahon* mandates enforcement of agreements to arbitrate § 12(2) claims will also eliminate another source of waste — the maintenance of duplicative proceedings in separate forums. As a result of this Court's decisions in *Byrd* and *McMahon*, courts are required to compel arbitration of claims asserted under § 10(b) of the 1934 Act, RICO and state and common law. Those courts that refuse to compel a § 12(2) claim asserted in the same lawsuit to arbitration require, and will continue to require the parties to litigate the § 12(2) claim in court while at the same time arbitrate the other claims. Considering that all of these claims are based on the same underlying factual allegations, these types of parallel and duplicative proceedings are extremely wasteful.

Shearson respectfully submits that the Court should grant certiorari and resolve the conflict among the lower federal courts by affirming the Fifth Circuit's decision rendering agreements to arbitrate § 12(2) claims enforceable.

CONCLUSION

For all of the foregoing reasons, respondent Shearson respectfully suggests that the Court issue a writ of certiorari in this case to review and affirm the decision of the United States Court of Appeals for the Fifth Circuit.

DATED: New York, New York
October 20, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Securities Act of 1933

Section 12(2), 15 U.S.C. § *77l(2)*:

> Any person who –
>
> . . .

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraph (2) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Section 14, 15 U.S.C. § 77n:

Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

Section 22(a), 15 U.S.C. § 77v(a):

The district courts of the United States and United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and

actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

Securities Exchange Act of 1934

Section 10, 15 U.S.C. § 78j(b):

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange –

• • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 27, 15 U.S.C. § 78aa:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts.

Section 29(a), 15 U.S.C. § 78 cc(a):

> Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule or an exchange required thereby shall be void.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 87-2888, 87-2889,
87-2890, 87-2891

OPELIA RODRIGUEZ DE QUIJAS, ET AL.,

Plaintiffs-Appellees,

—versus—

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a SHEARSON/AMERICAN EXPRESS, INC.,
and JON GRADY DEATON,

Defendants-Appellants.

• • • • • • • • • • •

MARY GRACE NORMAN,

Plaintiff-Appellee,

—versus—

SHEARSON/LEHMAN BROTHERS, INC., f/k/a
SHEARSON/AMERICAN EXPRESS, INC., ETC., ET AL.,

Defendants-Appellants.

• • • • • • • • • • •

ADELINA TRAPERO,

Plaintiff-Appellee,

—versus—

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a SHEARSON/AMERICAN EXPRESS, INC.,
It's Successors and Assigns, and
JON GRADY DEATON, Jointly and Severally,

Defendants-Appellants.

• • • • • • • • • • •

GENE GRIFFIN and GERTRUD GRIFFIN,
Plaintiffs-Appellees,

—versus—

SHEARSON/LEHMAN BROTHERS, INC., f/k/a SHEARSON/AMERICAN EXPRESS, INC., ETC., ET AL.,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

Before THORNBERRY, WILLIAMS and DAVIS, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

In these consolidated cases we confront the issue of whether claims brought under § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2) (1982), are subject to predispute arbitration agreements. This issue arises in the wake of *Shearson/American Express, Inc. v. McMahon*, ___ U.S. ___, 107 S.Ct. 2332, ___ L.Ed.2d ___ (1987), which enforced a predispute agreement to arbitrate § 10(b) claims under the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982). We find § 12(2) claims to be arbitrable, notwithstanding the earlier precedent of *Wilco v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1958).

I.

Appellees are individual investors in Brownsville, Texas, who suffered financial losses as the alleged result of unauthorized, fraudulent transactions in securities. Approximately $190,000 was invested by the Rodriguez De Quijas family; $38,000 by Mary Grace Norman; $100,000 by Adelina Trapero; and $80,000 by Gene and Gertrud Griffin. They sued appellants Jon Grady Deaton, the agent in charge of the accounts, and Shearson/American Express, Inc. ("Shearson"), pleading violations of various state and federal laws.[1] Appellant Shearson moved to compel arbitration pursuant to an arbitration clause contained in the customer agreements signed by each appellee,[2] and in accordance with the Federal Arbitration Act.[3]

[1] Their common claims include violations of §§ 12(2) and 17(a) of the 1933 Securities Act, and §§ 10(b), 15(c)(1), 15(c)(2) of the Securities Exchange Act of 1934; civil RICO violations consisting of mail and wire fraud under 18 U.S.C. §§ 1341, 1343, and 1961 (1982); securities fraud in violation of TEX. REV. CIV. STAT. ANN. § 581-33(A)(2) (Vernon 1964); violations of the Texas Deceptive Trade Practices Act, TEX. BUS. and COMM. CODE ANN. § 1746 *et seq.* (Vernon 1986); and common law breach of contract, fraud, and misrepresentation. The district court properly dismissed appellees' Securities Act § 17(a) claims under Fed.R.Civ.P. 12(b)(6), because this Court has held that there is no such private cause of action. *Landry v. All American Assurance Co.*, 688 F.2d 381 (5th Cir. 1982).

[2] Paragraph 13 of the Customer's Agreement provides:

> Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, the transactions with you for me, or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect of the National Association of Securities Dealers, Inc., or the Boards of Directors of the New York Stock Exchange, Inc. and/or the American Stock Exchange, Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within five (5) days after demand by you that I make such election then you may make such election. Judgment upon any award ordered by the arbitrators may be entered in any court having jurisdiction thereof.

[3] The Federal Arbitration Act, 9 U.S.C. § 1 *et. seq.* (1982) ("FAA"), mandates enforcement of agreements to arbitrate. *E.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The FAA states in pertinent part:

> § 2. Validity, irrevocability, and enforcement of agreements to arbitrate
>
> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration on a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part, thereof, or an agreement in writing to submit to arbitration an

(footnote continued)

The district court ordered arbitration of all claims except for the federal securities claims.

The district court correctly followed the Supreme Court's decision in *Wilco v. Swan*, *supra*, which clearly set out the invalidity of agreements to arbitrate § 12(2) claims under the Securities Act. And until recently, *Wilco* was interpreted in this Circuit as barring arbitration of Securities Exchange Act claims as well. *E.g. Mayaja, Inc. v. Bodkin*, 803 F.2d 157 (5th Cir. 1986), *cert. denied in part* ____ U.S. ____, 1075 S.Ct. 3210, 96 L.Ed.2d ____, *vacated in part*, ____ U.S. ____, 107 S.Ct. 3205, 96 L.Ed.2d 692 (1987); *Bustamonte v. Rotan Mosle, Inc.*, 802 F.2d 815 (5th Cir. 1986); *King v. Drexel Burnham Lambert, Inc.*, 796 F.2d 59 (5th Cir. 1986) vacated, ____ U.S. ____, 107 S.Ct. 3203, 96 L.Ed.2d 690 (1987). But the Supreme Court with *Shearson/American Express, Inc. v. McMahon*, *supra*, established the arbitrability of Securities Exchange Act claims. Appellant Shearson asserts this decision effectively overrules *Wilco* and allows arbitration of Securities Act claims.

Appellees do not contest the arbitrability of their Exchange Act claims following *McMahon*. They argue only that *Wilco* remains good law and prohibits arbitration of claims brought under § 12(2) of the Securities Act. Appellees argue further that even if § 12(2) claims are arbitrable, the parties lacked the requisite intent to agree to arbitration. We address these claims.

II.

The Supreme Court in *McMahon*, enforced a predispute agreement to arbitrate claims brought under § 10(b) of the 1934 Exchange Act. *Supra* at ____, 107 S.Ct. at 2343. In doing so, it refused under the 1934 Act to follow the reasoning of *Wilco v. Swan*, which invalidated predispute agreements to arbitrate 1933 Act

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(footnote continued)

> *existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

claims. *McMahon*, *supra*, at 538, 74 S.Ct. at 188-89. The *McMahon* majority opinion does not expressly overrule *Wilco*; the precise issue of the arbitrability of § 12(2) claims was not before the court.[4] Nevertheless, the reasoning in *McMahon* completely undermined *Wilco*, as this Court noted in *Noble v. Drexel Burnham Lambert, Inc.*, 823 F.2d 849, 850 n.3. (5th Cir. 1987)("*McMahon* undercuts every aspect of *Wilco v. Swan* . . . ; a formal overruling of *Wilco*, appears inevitable – or, perhaps, superfluous.").

The basic premise of *Wilco* is that a predispute agreement to arbitrate § 12(2) claims is invalid by virtue of § 14 of the Securities Act, 15 U.S.C. § 77n. (1982). Secton 14 voids any stipulation "to waive compliance with any provision" of the Securities Act. The *Wilco* court held the jurisdictional provision of the Securities Act to be the type of non-waivable provision contemplated in § 14. *Wilco*, *supra*, 346 U.S. at 434, 74 S.Ct. at 186. The Supreme Court states in *McMahon*, however, that § 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a)(1982), which is a non-waiver provision virtually identical to § 14 of the Securities Act, does not bar predispute arbitration agreements. *McMahon*, *supra*, ____ U.S. at ____, 107 S.Ct. at 2338-39.[5]

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[4] The opinion states: "While stare decisis concerns may counsel against upsetting *Wilco*'s contrary conclusion under the Security Act, we refuse to extend *Wilco*'s reasoning to the Exchange Act. . . ." *McMahon*, *supra* ____ U.S. at __, 107 S.Ct. at 2341.

[5] The *McMahon* court reasons that § 29(a) voids only those agreements which waive "compliance" with provisions of the Exchange Act, and that because the jurisdictional provision of the Exchange Act does not impose substantive obligations with which to comply, nothing prevents its waiver. *Supra*, at ____, 107 S.Ct. at 2338. Section 27, the jurisdictional provision of the Exchange Act, 15 U.S.C. § 78aa (1982), is similar to the jurisdictional provision of the Securities Act. Section 27 of the Exchange Act states in part:

> The district courts of the United States . . . shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enfore any liability or duty created by this title or the rules and regulations thereunder.

(footnote continued)

The Supreme Court reconciles *McMahon* with *Wilco* by characterizing the 1953 opinion as outdated in its bias against arbitration. The *McMahon* majority opinion reinterprets *Wilco*, as follows: "*Wilco* must be read as barring waiver of a judicial forum only where arbitration is inadequate to protect the substantive rights at issue." *McMahon*, *supra*, at ____, 107 S.Ct. at 2339. As *McMahon* makes clear, the Supreme Court no longer considers arbitration inadequate to protect substantive rights. *Id.*, at ____, 107 S.Ct. at 2340-41. For this proposition, the court relied upon *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985); *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983); and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974). Advances in arbitration noted by the Supreme Court, particularly the broad oversight authority of the Securities Exchange Commission, *McMahon*, *supra*, at ____, 107 S.Ct. at 2341, apply equally to the protection of substantive rights under both the Securities Act and the Exchange Act.

Appellees argue, however, that congressional intent is the crucial distinction between the two Acts. They claim that Congress, by preserving *Wilco* in the 1975 revisions of the Exchange Act, manifested its intent that at least § 12(2) claims should

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(footnote continued)
Compare § 22(a), the jurisdictional provision of the Securities Act, 15 § 77(a)(1982), which reads as follows:

> The district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

remain non-arbitrable.[6] We find it implausible that Congress intended to prohibit arbitration of Securities Act claims but intended to allow courts to determine the arbitrability of Exchange Act claims.[7] Similarly fine distinctions between the two Acts have been presented throughout the course of the debate over securities arbitration. *See, e.g.*, *McMahon*, *supra*, at ____, 107 S.Ct. at 2347 n.n.1-2 (Blackmun J., dissenting). We do not, however, find these asserted distinctions controlling on the issue of arbitration. The Supreme Court opinion in *McMahon*, which binds us here, turns solely on the adequacy of arbitration to resolve securities disputes. It does not distinguish between the Exchange Act and the Securities Act. Furthermore, it has been the position of this Court that, for the purposes of arbitration, similarities between the Securities Act and the Exchange Act outweigh any differences between them. *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 n.3 (1976). We thus follow the reasoning of the Supreme Court in *McMahon* and our own decision in *Noble* which lead directly to the obsolescence of *Wilco* and the arbitrability of Securities Act § 12(2) claims.

III.

Appellees claim that even if § 12(2) claims are arbitrable, the intent to agree to arbitration was lacking in their cases. At the time the agreements were signed, claim appellees, Securities Act claims were controlled by *Wilco* and clearly were not subject to

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[6] The Conference Report accompanying the amendments to § 28(b) of the Exchange Act, 15 U.S.C. § 78bb(b), reads as follows:

> It was the clear understanding of the conferees that this amendment did not change existing law, as articulated in *Wilco v. Swan*, 346 U.S. 427 (1953), concerning the effect of arbitration proceedings provisions in agreements entered into by persons dealing with members and participants of self-regulatory organizations.

H. R. Conf. Rep. No. 229, 94th Cong., 1st Sess., 111 (1975).

[7] The Supreme Court states in *McMahon*, *supra*, at ____, 107 S.Ct. at 2343: "Hence, the *Wilco* issue was left to the courts: it was unaffected by the amendment to § 28(b)."

arbitration. We cannot conclude that appellees lacked the intent to agree to arbitration because, at the time the customer agreements were signed, courts refused to honor clauses compelling arbitration of securities claims. At the time the contracts were signed, the same circumstances existed barring arbitration of Exchange Act claims. *E.g. Sibley, supra*, at 543. Appellees cannot now contend that they lacked the intent to arbitrate their Exchange Act claims in view of the Court's holding in *McMahon*. Neither the Supreme Court nor this Circuit considered that the earlier lack of authorization to arbitrate was an obstacle in *McMahon, supra* or *Noble, supra*. Both cases ordered arbitration of Exchange Act claims under analogous circumstances.

Authority no longer exists to deny arbitration of the § 12(2) claims as the parties agreed in their contracts. Arbitration must be directed both as to the Securities Act claims and Exchange Act claims. That portion of the judgment of the district court which denied directing arbitration of the Securities Act § 12(2) claims is

REVERSED.

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Sarah L. Holmes

Deputy

New Orleans, Louisiana

OCT 7 1988

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 87-2888, 87-2889,
87-2890 & 87-2891

OPELIA RODRIGUEZ DE QUIJAS, et al.,

Plaintiffs-Appellees,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a SHEARSON/AMERICAN EXPRESS, INC.,
and JON GRADY DEATON,

Defendants-Appellants.

* * * * * * * * * * *

MARY GRACE NORMAN,

Plaintiff-Appellee,

v.

SHEARSON/LEHMAN BROTHERS, INC., f/k/a
SHEARSON/AMERICAN EXPRESS, INC., etc., et al.,

Defendants-Appellants.

* * * * * * * * * * *

ADELINA TRAPERO,

Plaintiff-Appellee,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a SHEARSON/AMERICAN EXPRESS, INC.,
Its Successors and Assigns, and
JON GRADY DEATON, Jointly and Severally,

Defendants-Appellants.

* * * * * * * * * * *

GENE GRIFFIN and GERTRUD GRIFFIN,
Plaintiffs-Appellees,

v.

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a SHEARSON/AMERICAN EXPRESS, INC., etc., et al.,
Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(June 22, 1988)

Before THORNBERRY, WILLIAMS and DAVIS,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

OFELIA RODRIGUEZ DE QUIJAS,	§	
ET AL.	§	
	§	
VS.	§	C. A. NO.
	§	B-85-360
SHEARSON/AMERICAN EXPRESS, INC.	§	
Its Successors and Assigns, and	§	
JON GRADY DEATON, Jointly and	§	
Severally	§	

MEMORANDUM AND ORDER

FACTS

In August of 1985, Plaintiffs Ofelia Rodriguez de Quijas, *et al.* brought suit against Defendants Shearson/American Express and Jon Grady Deaton based upon a series of transactions involving the financial management of separate accounts totalling approximately $190,000. Plaintiffs allege that Defendant Deaton, the manager of the discretionary account with Shearson, fraudulently induced the Plaintiffs to enter into the investment contract. Additionally, it is alleged that Defendants conducted a number of unauthorized and/or fraudulent transactions and misrepresented to Plaintiffs the nature of these transactions. These transactions, it is asserted, were designed to generate commissions and profits for Defendants and resulted in staggering losses for the Plaintiffs. Plaintiffs bring this action under sections 12(2) and 17(a) of the 1933 Federal Securities Act and sections 10(b) (and rule 106-5 thereunder), 15(c)(1), 15(c)(2) of the Securities Exchange Act of 1934 (and rules 15cl-2, 15cl-4, 15cl-6, thereunder). Plaintiffs also assert civil RICO claims based upon predicate acts of mail and wire fraud, in violation of 18 U.S.C. § 1341, § 1343, and § 1961, as well as acts of securities fraud in violation of TEX. CIV. ART. 581-33(A)(2), claims under the Texas Deceptive Trade Practices Act, TEX. BUS.

& COM. CODE ANN. § 17.46 *et seq.* (Vernon 1986), and common law breach of contract, fraud, and misrepresentation.

Defendants have filed a Motion to Compel Arbitration of all the claims arising out of transactions in question pursuant to an arbitration clause in the investment contracts signed by the Plaintiffs. The Court must now decide which of the claims must be arbitrated.

A) *The Arbitration Clause*

The question whether arbitration is controlling is determined on the basis of the existence of an arbitration clause that on its face appears broad enough to encompass the parties' claims. *Mar-Len of LA., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 (5th Cir. 1985); *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334, 338 (5th Cir. 1984). The Fifth Circuit in *Commerce Park* reasoned that when confronted with an arbitration clause, a presumption arises that arbitration should not be denied "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Id. quoting Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979). Thus, as a general rule, whenever the scope of an arbitration clause is in question, the court should construe the clause in favor of arbitration. *United Steelworkers of America v. Warrior & Gulf Navigational Co.*, 363 U.S. 574, 583, 80 S.Ct. 1347, 1353, 4 L.Ed.2d 1409 (1960). The Court, after reviewing the arbitration clause in this case, is of the opinion that it is more than sufficiently broad to cover all the claims involved in this cause of action.[1]

[1] The arbitration agreement in paragraph 13 reads as follows:

> "Unless unenforceable due to federal or state law, any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof, shall be settled by arbitration in accordance with the rules then in effect, of the National Association of Securities Dealers, Inc. as I may elect. If I do not make my election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitration may be entered in any court having jurisdiction thereof."

The Plaintiffs contend that the arbitration clause was fraudulently induced and thus cannot control the disposition of this case. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the United States Supreme Court dealt with the issue of whether fraudulent inducement can be brought before an arbitrator instead of district court. The Supreme Court reasoned that:

> If the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court *may* proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement generally . . . [A] federal court may consider only issues relating to the making and performance of the agreement to arbitrate.

Id. at 403-04, 87 S.Ct. at 1805-06.

The Seventh Circuit in *Schacht v. Beacon Ins. Co.*, 742 F.2d 386, 389 (7th Cir. 1984), reaffirmed this position and noted that only when the claimed contractual invalidity goes to the arbitration clause itself does the court decide the existence of a contractual provision. *See also Mar-Len of LA., Inc. v. Parsons-Gilbane*, 773 F.2d 633 (1985) (alleging fraud in the inducement of a modification to the original contract).

Although Plaintiffs, in their brief in Opposition to Motions to Dismiss and Compel Arbitration, purport to allege only fraud in the inducement of the arbitration clause itself, the Court sees nothing before it which would lead the Court to believe the alleged fraud in the inducement applied solely to the arbitration clause. To the contrary, in all the Plaintiffs' Affidavits in Opposition to Defendants' Motion to Stay, they stated that the "contracts" were not explained to them, and that they could not understand the technical Shearson "contract"; not just the arbitration clause. The Court believes that Plaintiffs cannot avoid the application of *Prima Paint* by simply alleging the fraud on the clause itself when the substance of the complaint reveals fraud on the whole contract. Accordingly, Plaintiffs' claim of fraud in the inducement must be resolved in the arbitral forum.

B) *The Securities Act Claims*

In *Wilco v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1958), the United States Supreme Court held that predispute agreements to arbitrate claims that arise under Securities Act of 1933 are not enforceable. The Court pointed to language in § 14 of the Securities Act of 1933, 15 U.S.C. § 77n, which declared "void" any "stipulation" waiving compliance with any "provision" of the Securities Act. The Supreme Court thus held that an agreement to arbitrate amounted to a stipulation waiving the right to seek a judicial remedy, and was therefore void. 346 U.S. at 434-435. Subsequent court decisions have preserved the vitality of this Supreme Court holding. *See Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238, 1240 n.1 (1985); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore*, 590 F.2d 823, 826-827 (10th Cir. 1979); *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 558 F.2d 831 (7th Cir. 1977). Accordingly, the 1933 Securities Act claims cannot be arbitrated.

Although Defendants would fail on the 1933 Act claim, they would assert that the claims arising under § 10(b) of the Securities Exchange Act of 1934 are distinguishable and should not be governed by the *Wilco v. Swan* holding. In *Scherk v. Alberto Culvert Company*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), the Supreme Court failed to extend *Wilco* to § 10(b) claims. The Court stated that the provisions of the 1934 Act differed from those of the 1933 Act and thus the reasoning of *Wilco* was inapplicable.[2] Recently, in *Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. 1238 (1985), Justice White, in his concurrence, resurfaced the apparent difference between the two Acts but the Supreme Court's majority declined to directly resolve the question.

[2] The Supreme Court questioned the applicability of *Wilco* to a claim arising under § 10(b) of the Securities Exchange Act of 1934 because unlike the 1933 Act, the 1934 Act did not expressly give rise to a private cause of action. Additionally, since a cause of action under § 10(b) and Rule 106-5 is implied rather than express, the "waiver" provision under the 1933 Act would not be literally applicable.

Notwithstanding the doubts raised by the Supreme Court, the case law in the Fifth Circuit is clear on the issue of the arbitrability of the 1934 Act. The Court has consistently held that Congress intended these claims to be non-arbitrable. *See, e.g., Mayaja, Inc. v. Bodkin, et al.*, No. 85-2762, slip op. 671, 679 (5th Cir. October 17, 1986); *Bustamante v. Rotan Mosle, Inc.*, No. 86-2300, slip op. 339, 340 (5th Cir. October 17, 1986); *Smokey Greenhaw Cotton Co. v. Merrill Lunch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1275 n.1 (5th Cir. 1986); *Sibley v. Tandy Corp.*, 543 F.2d 540, 543 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977). Basing their decisions upon an extension of the Supreme Court's analysis in *Wilco v. Swan*, these opinions adhered to the view that the similarities between the 1933 Securities Act and the 1934 Exchange Act far outweighed any differences that might exist.

Additionally, Defendants would assert that the recent Supreme Court decision in *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985) would diminish the vitality of its holding in *Wilco* and implicitly overrule the established precedent in the Fifth Circuit. Presented with this argument in *Mayaja, Inc. v. Bodkin, et al.*, No. 85-2762, slip. op. 671 (5th Cir. October 24, 1986), the Fifth Circuit declined to give it much consideration. Instead, it elected to follow the established precedent in the Circuit and held, absent a clearer statement from the Supreme Court on the issue, that the 1934 Exchange Act claims are not arbitrable. *Id.* at 679. This Court must follow the precedent set forth by the Fifth Circuit and rule that both the 1933 Securities Act claims and the 1934 Exchange Act claims are not arbitrable. Therefore, solely with regard to these claims, the Defendant's Motion to Compel Arbitration is hereby DENIED.

C) *The RICO Claims*

The question of whether private RICO claims may be arbitrated is the subject of a split of authority among the Circuit Courts. The Second Circuit, in *McMahon v. Shearson/American Express, Inc.*, 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 55 U.S.L.W. 3197 (U.S. Oct. 6, 1986) (86-44), held that no RICO claims were ever arbitrable, regardless of the predicate offenses

asserted. The Third Circuit, in contrast, held in *Jacobson v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 797 F.2d 1197 (3rd Cir. 1986) that RICO claims may be arbitrated when the offenses predicate to the required "pattern of racketeering activity" are arbitrable.[3] The Fifth Circuit, until its recent decision in *Mayaja, Inc. v. Bodkin*, No. 85-2762, slip op. 671 (5th Cir. October 24, 1986), had not expressly ruled on the issue.[4] In the decision, the Fifth Circuit held that private RICO claims must be submitted to arbitration if a valid clause encompasses the claims. *Id.*

In order for a statutory claim like the civil RICO statute to overcome the overriding federal policy in favor of arbitration, it is necessary to show that Congress intended the statutory claim to be non-arbitrable. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). In reaching its decision in *Mayaja, Inc.*, the Panel relied on the legislative history of the civil RICO statute; specifically, section 1964(c), the treble damages provision. Finding nothing in the express intent of Congress, the Panel examined the underlying purpose of the statute to determine whether Congress implicitly intended that all such claims be non-arbitrable. The Panel then relied on the Supreme Court's examination in *Mitsubishi* of section 4 of the Clayton Act.[5] 105 S.Ct. at 3358-60. The Panel agreed with the Supreme

[3] Therefore, if the Third Circuit were controlling, and the predicate offenses alleged were separate acts of wire and mail fraud, the RICO claims founded under 18 U.S.C. § 1341 and § 1342 would be arbitrable. If, however, the Securities Act violations were the predicate offenses alleged, the claims would be non-arbitrable pursuant to *Wilco v. Swan* and subsequent decisions. *Supra.*

[4] In *Smokey Greenhaw Cotton, Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 785 F.2d 1274, 1280-82 (5th Cir. 1986), the Fifth Circuit addressed, in dicta, the issue of arbitrability of private RICO claims. On petition for rehearing en banc, the Court noted that its reasoning was called into question by *Mitsubishi*. The Court thereafter amended its opinion "to refuse to decide the arbitrability *vel non* of the plaintiff's RICO claim." *Id.* at 1282.

[5] The Panel reasoned that since the legislative history of section 1964(c) made repeated references to section 4 of the Clayton Act, these references to the Clayton Act could be adopted by reference to the purposes of the Clayton Act's treble damages provision.

Court's assessment that the treble damages provision served a crucial deterrent function. In citing *Mitsubishi* at 3359, however, they found that the "action . . . seeks *primarily* to enable an injured competitor to gain compensation for that injury." Therefore, since the deterrent function was secondary to the compensatory function, the statute would continue to serve both its remedial and deterrent functions "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mayaja, Inc. v. Bodkin*, No. 85-2762, slip op. 671 (5th Cir. October 24, 1986) *citing Mitsubishi*, 105 S.Ct. at 3359-60. Having paralleled *Mitsubishi*'s analysis, the Panel found that the congressional purposes of compensation and deterrence underlying section 1964(c) may be fulfilled by arbitration of the RICO claims. Thus, there was no evidence that Congress implied that all RICO claims were non-arbitrable.

Following the precedent set forth in *Mayaja, Inc.*, the Court accordingly rules that Plaintiffs' RICO claims are arbitrable and that the Defendants' Motion to Compel Arbitration of these claims is hereby GRANTED.

D) *The Deceptive Trade Practices Act Claim*

There is no Texas case law authority which would definitively determine whether Plaintiffs' case under the Texas Deceptive Trade Practices Act can or cannot be arbitrated. However, in *Ommani v. Doctor's Associates, Inc.*, 789 F.2d 298, 300 (5th Cir. 1986), the Fifth Circuit stated that enforcement of an otherwise valid arbitration clause cannot be denied solely by virtue of the suggestion that a claim is also based on the Texas Deceptive Trade Practices Act. The Panel cited the U.S. Supreme Court decision in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) for the proposition that states may not thwart the strong federal policy favoring arbitration. Although these statements are rather broad, the Court is persuaded that the Deceptive Trade claims can be arbitrated under the Federal Arbitration Act. Absent any clear Texas authority to the contrary, this Court is compelled to do so.[6] *See also Marley v.*

[6] Plaintiffs assert the novel argument that the contract provision in this case is self-limiting and the federal preemption doctrine would not be controlling.
(footnote continued)

Drexel Burnham, Inc., 566 F.Supp. 333 (N.D. Tex. 1983). Therefore, the Defendants' Motion to Compel Arbitration of the Texas Deceptive Trade Practices Act is hereby GRANTED.

E) *Motion To Dismiss The Section 17(a) Claims*

Although the Supreme Court has not ruled on the issue, the Fifth Circuit has clearly held that there is no private cause of action under Section 17(a) of the Securities Exchange Act of 1933. *Landry v. All American Assurance Company*, 688 F.2d 381 (5th Cir. 1982. The Court therefore concludes that Defendants' Motion to Dismiss under Rule 12(b)(6) (failure to state a claim upon which relief can be granted) is hereby GRANTED and the claims under § 17 be DISMISSED.

F) *The Stay Issue*

The Court hereby ORDERS that the non-arbitrable Securities Act claims proceed under this cause of action and those claims will not be stayed pending resolution of the arbitrable claims. *See Dean Witter Reynolds, Inc. v. Byrd*, 105 S.Ct. at 1245 (1985). Therefore, the Defendants' Motion to Stay Pending Arbitration will be DENIED with regard to the Securities Act claims. As only the Securities Act claims remain before this Court, all other claims asserted by Plaintiffs will be presented in arbitration.

It is so ORDERED.

DONE at Brownsville, Texas this 18th day of November, 1986.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge

(footnote continued)
The relevant provision states: "Unless unenforceable due to federal or state law, any controversy . . . shall be settled by arbitration." Even if the arbitration would be unenforceable under Texas law, the Court cannot concede that the provisions in the language of this contract would override the Federal Arbitration Act.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

OFELIA RODRIGUEZ DE QUIJAS, JOSE LUIS RODRIGUEZ, JOSE LUIS RODRIGUEZ MORENO, MARTHA LETICIA RODRIGUEZ MORENO, LUIS ALEJANDRO RODRIGUEZ MORENO AND BEATRIZ RODRIGUEZ	(	NO. B-85-360
Plaintiffs	(	
VS.	(	
SHEARSON/AMERICAN EXPRESS, INC., ITS SUCCESSORS AND ASSIGNS AND JON GRADY DEATON	(	
Defendants	(	

ORDER

CAME ON TO BE CONSIDERED the motion of Defendant Shearson/American Express to compel all of Plaintiffs' causes of action to be subjected to arbitration, and the Court, having considered same, is of the opinion that all of Plaintiffs' 1934 Securities Act Claims against Shearson/American Express should be submitted to arbitration but that Plaintiffs' claims under §12(2) of the 1933 Securities Act be litigated in Federal District Court and that a default judgment should be entered against Defendant Deaton, and accordingly, it is ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiffs' 1933 Securities Act §12(2) claims remain in Federal District Court;

2. That all other of Plaintiffs' claims against Shearson/American Express be submitted to arbitration;

3. That Defendant Shearson/American Express submit the arbitrable claims to the appropriate arbitral forum within 30 days;

4. That default judgment be entered against Defendant Jon Grady Deaton and that a hearing be held on damages on the 31st day of July, 1987 at 9:00 o'clock A.M.;

5. That all other relief not expressly granted herein, be denied.

Signed for entry this 9th day of July, 1987.

JUDGE PRESIDING

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk
By _____
Deputy Clerk

APPENDIX F

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 87-2888

D.C. Docket No. CA-B-85-360

OPELIA RODRIGUEZ DE QUIJAS, ET AL.,

Plaintiffs-Appellees,

versus

SHEARSON/LEHMAN BROTHERS, INC.,
f/k/a SHEARSON/AMERICAN EXPRESS, INC.,
and JON GRADY DEATON,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before THORNBERRY, WILLIAMS, and DAVIS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the portion of the judgment of the District Court in this cause which denied directing arbitration of the Securities Act § 12(2) claims is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendants-appellants the costs on appeal, to be taxed by the Clerk of this Court.

May 31, 1988

ISSUED AS MANDATE: JUL 5 1988

Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ Sarah L. Holmes
Deputy
New Orleans, Louisiana

APPENDIX G

District Court Cases Addressing the Enforceability of Agreements to Arbitrate 1933 Act Claims Post-*McMahon*

A. Cases Holding 1933 Act Claims Arbitrable Based on *McMahon*

Second Circuit

DeKuyper v. A.G. Edwards & Sons, Inc., No. N-85-529 (D. Conn. Dec. 10, 1987)

Third Circuit

Kavouras v. Visual Products Systems, Inc., 680 F. Supp. 205 (W.D. Pa. 1988)

Ryan v. Liss, Tenner & Goldberg Securities Corp., 683 F. Supp. 480 (D.N.J. 1988)

Fifth Circuit

Baldwin v. Cowen & Company, No. H-86-4247 (S.D. Tex. Jan. 19, 1988)

Rosenblum v. Drexel Burnham Lambert, Inc., No. 87-1903 (E.D. La. Aug. 18, 1987)

Ninth Circuit

Staiman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 673 F. Supp. 1009 (C.D. Cal. 1987)

Tenth Circuit

Reed v. Bear, Stearns & Co., No. 88-2040-0 (D. Kan. Aug. 19, 1988) (LEXIS, Fedsec library, Courts file)

Adams v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,741 (W.D. Okla. April 21, 1988)

Jeppsen v. Piper, Jaffray & Hopwood, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 93,996 (D. Utah Aug. 16, 1988)

Eleventh Circuit

Aronson v. Dean Witter Reynolds, Inc., 675 F. Supp. 1324 (S.D. Fla. 1987)

Bender v. Prudential-Bache Securities, Inc., No. 87-8572-CIV-ZLOCH (S.D. Fla. Mar. 14, 1988)

Benoay v. E.F. Hutton & Company, No. 82-6709-Civ.-Paine (S.D. Fla. Jan. 8, 1988)

State Court Cases

Rocz v. Drexel Burnham Lambert, Inc., 743 P. 2d 971 (Ariz. App. 1987)

U.S. Optical Frame Co. v. Prudential-Bache Securities, Inc., No. 86-14071 (Cir. Ct. Fla. Sept. 28, 1987)

B. Cases Holding 1933 Act Claims Nonarbitrable Based on *Wilko*

Second Circuit

McCowan v. Dean Witter Reynolds, Inc., 682 F. Supp. 741 (S.D.N.Y. 1987)

Third Circuit

Abadian v. Drexel Burnham Lambert, Inc., No. 88-0186 (E.D. Pa. Aug. 4, 1988)(LEXIS, Fedsec library, Courts file)

Helfricht v. Jeffries & Co., No. 85-0466 (D.N.J. Oct. 8, 1987)(LEXIS, Fedsec library, Courts file)